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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA DAVID COOMBS, Defendant and Appellant.	C067063 (Super. Ct. No. MCYKCRBF 10-0841)

A jury found defendant Joshua David Coombs guilty of felony sale of marijuana. (Health & Saf. Code, § 11360, subd. (a).) Defendant appeals, contending he received constitutionally ineffective counsel due to counsel's failure to properly object to the admission of evidence of his prior marijuana sales. He also requests this court independently review sealed materials reviewed in camera by the trial court. We have reviewed the material and affirm the judgment.

BACKGROUND

Agent Monty Cervelli, a special agent with the California Department of Justice, conducted a "controlled buy" operation, using an informant named Michael Craig. Craig signed a contract with the Siskiyou County District Attorney's office, agreeing to produce 10 prosecutable cases in exchange for dismissal of charges pending against him for being a felon in possession of a firearm and ammunition. As part of his informant training, Craig was admonished by law enforcement on the definition of entrapment.

During the program, law enforcement paid for Craig's operation costs, including food, transportation, and lodging. The operation lasted approximately two months. At the conclusion of the operation, Craig had provided 14 controlled marijuana buys, six controlled methamphetamine buys, and one controlled hydrocodone buy. Law enforcement then paid for a plane ticket for Craig to leave the area.

Defendant Joshua David Coombs was one of the subjects investigated during the operation. Craig had known defendant since 2004 and saw him approximately once a month. Craig called defendant and arranged to meet so defendant could sell him marijuana. Craig had to cancel the first arranged meeting because Agent Cervelli and his partner were not available.

On June 1, 2010, Craig called defendant again and asked to buy $50 of "pot." Defendant said "okay" and they arranged to meet at Carl's Jr. restaurant where defendant worked. Defendant

told Craig he would have another person give him the marijuana because he did not have any on him at the moment.

Earlier on June 1, 2010, defendant had asked his coworker, Steven Mowatt, to lend him some money for gas. Mowatt did not have any money to lend. A short time later, defendant asked Mowatt if he had any marijuana that he could sell. Defendant suggested Mowatt allow defendant to sell the marijuana to a friend and then borrow the money from the sale until payday when he would pay Mowatt back. Defendant told Mowatt that the friend had been "bugging" him for awhile. Mowatt agreed to defendant's plan.

Before the buy, Agent Cervelli met Craig, searched him and his vehicle, fitted him with an audio-video recording device, and provided him with $50 to buy the marijuana. Agent Cervelli and another agent then followed Craig to the buy location to observe the transaction. Craig arrived at Carl's Jr. around 7:00 p.m. and went into the restaurant to signal defendant. Defendant indicated to meet him behind the restaurant so Craig walked around to the back where he met defendant and Mowatt. Defendant introduced the two men and then Mowatt handed Craig a white plastic bag. Defendant nodded to Craig and Craig handed Mowatt the buy money. Mowatt then went back inside the restaurant and handed defendant the $50. The white plastic bag contained 9.35 grams of marijuana.

Craig estimated he called defendant a total of approximately 10 times throughout the operation -- some of those times leaving messages on his answering machine. Craig has two

prior felony convictions and a misdemeanor conviction, sustained approximately 10 years earlier. Mowatt, who also testified at trial, had been facing two felony charges for selling marijuana. In exchange for his truthful testimony (as judged by the trial court), it was agreed he would serve no more than 60 days in county jail.

Defendant's fiancée testified that Craig had called "constantly." He would call her cell phone (as that was the only phone in the household), starting in the morning and continuing "all day." She began to send his calls straight to voicemail, but sometimes she would answer and talk to him just to get him to stop calling. She claimed he called between three and four times a day, at least every other day, for a period of about a month. At the time, she did not know what he was calling about.

Defendant testified that, about a month before June 1, 2010, he talked to Craig in the parking lot of a McDonald's. Craig asked him if he knew where to get marijuana and defendant told him he did not. Craig pressed him to try to find some and he repeated to Craig that he had no way to get any. Craig then started calling defendant's fiancée and workplace, leaving messages to call him back. On the occasions defendant called him back, Craig would ask him again to sell him marijuana. Defendant told him he did not know anyone or anywhere from which to get it and he did not sell it himself. Craig continued to call.

Finally, defendant "got pretty fed up with the badgering and constant calling" so he arranged to have Craig meet a friend named "Shane" who had a "215 card."[1] Craig, however, missed the meeting and defendant told him he would not arrange another one. Nonetheless, Craig called him at work on June 1, 2010, and asked him to "set something up." Defendant told him no. Later that day, he tried to borrow $20 for gas from Mowatt but Mowatt did not have any cash. Defendant knew Mowatt had a "215 card" and suggested Mowatt sell some marijuana to Craig and let him borrow the money from the sale. Defendant then called Craig and told him to come to Carl's Jr. where he intended to introduce Craig to Mowatt. He assumed they would make their transaction later that day. When Craig arrived, he introduced him to Mowatt and then went inside the restaurant. He did not know Mowatt had the marijuana in his possession at the time and did not witness the transaction.

During rebuttal, Craig testified that neither defendant nor defendant's fiancée had told him to stop calling. He had purchased marijuana from defendant on approximately 12 previous occasions. Agent Cervelli testified that Craig had been given specific instructions requiring him to break off contact with a subject if that subject did not want to deal with him. In fact, it was part of the contract. Agent Cervelli had monitored some

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[1] A "215 card" refers to the government card issued under the Compassionate Use Act of 1996 (Health & Saf. Code, § 11362.5; also known as Prop. 215).

of Craig's contacts with other subjects and never noted Craig to be inappropriate.

DISCUSSION

I

Defendant contends his trial counsel was constitutionally ineffective because he failed to object to the evidence of defendant's prior marijuana sales pursuant to Evidence Code section 352.[2] He argues that, had counsel so objected, the evidence would have been excluded as unduly prejudicial and it is reasonably probable he would have then received a more favorable outcome. We reject his contention.

"To prevail on a claim of ineffective assistance of counsel, a defendant '"must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice."'" (*People v. Maury* (2003) 30 Cal.4th 342, 389.) "[P]rejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*Ibid.*, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694 [80 L.Ed.2d 674, 698].)

During opening statements, defense counsel stated that defendant had never sold marijuana before. During Agent

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[2] Undesignated statutory references are to the Evidence Code.

Cervelli's testimony, he mentioned that Craig had informed him that he had purchased marijuana from defendant in the past. Defense counsel objected because the statement had not been disclosed during discovery. The prosecutor explained that she had not planned to introduce that evidence in her case-in-chief. The trial court struck the testimony and instructed the jury not to consider it for any purpose.

Thereafter, defendant testified on his own behalf. During direct examination, he testified that had repeatedly told Craig he could not get any marijuana for him and did not sell it himself, but Craig continued to ask. On cross-examination, defendant "corrected" the prosecutor's statement that Mowatt had arrived with $50 worth of marijuana (the amount Craig had asked for) by stating, "Well, if you want to get technical, 9.35 grams is about a hundred dollars worth of marijuana." The prosecutor asked defendant how he knew that and defendant replied he knew that from talking to people and "just being on the street." The prosecutor then asked defendant if he had sold marijuana before the date of the charged offense. Defense counsel objected on relevance grounds. The trial court initially sustained the objection but, after an offer of proof that defendant would answer the question, "No, I have not," and argument from the prosecutor regarding its admissibility for impeachment, the court reconsidered its ruling and allowed the testimony.[3]

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[3] The prosecutor also argued the evidence was relevant to prove defendant's state of mind for aiding and abetting the sale

Defendant then denied he had sold marijuana in the past. In the prosecution's rebuttal case, Craig testified that defendant had previously sold marijuana to him on approximately 12 occasions and he had personally seen defendant sell it to others on four or five occasions. Agent Cervelli testified that Craig told him that, between he and his wife, they had purchased marijuana from defendant between 20 and 50 times.

Defendant argues that his counsel's failure to further object to the evidence of his prior marijuana sales under section 352 on the grounds that its prejudicial effect outweighed any probative value constituted deficient representation. In making his argument, he assumes, with little analysis that, had counsel made the objection, the evidence would have been excluded. However, evidence of his prior marijuana sales was highly relevant and not unduly prejudicial; therefore, any such section 352 objection would have most likely been futile.

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Such evidence is admissible. (§ 351.) A trial court may, however, in its discretion, exclude otherwise relevant evidence under section 352 if its probative value is

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of marijuana. The trial court, however, appeared to rely upon its value for impeachment in admitting the testimony.

substantially outweighed by the probability that admission will unduly consume time, create a substantial danger of undue prejudice, confuse the issues, or mislead the jury.

Here, defendant asserted the defense of entrapment, for which he had the burden of proof, and relied on his own testimony and that of his fiancée. Defendant provided an explanation for his behavior which included a claim that Craig was "harassing" him despite his repeated statements that he did not know where to get marijuana and that he does not sell marijuana. This testimony directly contradicted Craig's testimony, rendering credibility pivotal. If the jury believed defendant's testimony, it could conclude that Craig's actions in continuing to contact defendant (even if it was not quite as frequently as defendant's girlfriend testified) constituted "badgering, persuasion by . . . coaxing, repeated and insistent requests, or an appeal to friendship or sympathy" which the jury was instructed could be examples of entrapment. Thus, evidence that defendant was untruthful in his testimony about the fact that he did not know where to get marijuana and that he had, in fact, sold marijuana to Craig on numerous previous occasions, was clearly relevant to an evaluation of defendant's credibility and the legitimacy of his version of the events.

"'Unless the dangers of undue prejudice, confusion, or time consumption "'substantially outweigh'" the probative value of relevant evidence, a section 352 objection should fail. [Citation.] "'The "prejudice" referred to in Evidence Code section 352 applies to evidence *which uniquely tends to evoke an*

emotional bias against the defendant as an individual and which has very little effect on the issues . . . .”’ In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors’ emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.’ [Citation.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 439, italics added.)

Defendant does not argue that evidence of his prior marijuana sales uniquely tends to evoke an emotional bias or reaction in lay persons, rendering the evidence unduly prejudicial. Instead, defendant relies on a statement made by the California Supreme Court regarding the prejudicial nature of such evidence and argues the evidence “eviscerated” his defense of entrapment.

In *People v. Barraza* (1979) 23 Cal.3d 675, the court explained that, unlike federal law and some other jurisdictions, in California entrapment focuses upon police conduct and not the defendant’s predisposition. The *Barraza* court explained: “The principle currently applied in California represents a hybrid position, fusing elements of both the subjective and objective theories of entrapment. In *People v. Benford* (1959) 53 Cal.2d 1, 9, this court unanimously embraced the public policy/deterrence rationale that Justices Roberts and

Frankfurter had so persuasively urged. In doing so, we ruled inadmissible on the issue of entrapment the most prejudicial inquiries that are allowed under the subjective theory, i.e., evidence that the defendant 'had previously committed similar crimes or had the reputation of being engaged in the commission of such crimes or was suspected by the police of criminal activities . . . .' (*Id.*, at p. 11.)" (*People v. Barraza, supra*, at p. 688, fn. omitted.) Thus, "matters such as the character of the suspect, his predisposition to commit the offense, and his subjective intent are irrelevant." (*Id.* at pp. 690–691, fn. omitted.)

Barraza did not, contrary to defendant's position, establish that such evidence, which is inadmissible on the issue of entrapment, is "unduly prejudicial" for purposes of section 352 when offered for otherwise admissible purposes such as impeachment. Moreover, the risk of undue prejudice was significantly diminished by the trial court's jury instructions.

The trial court instructed the jury on the defense of entrapment, informing the jury that "[a] person is entrapped if a law enforcement officer or his or her agent engaged in conduct that would cause a normally law-abiding person to commit the crime." The court's further instructions told the jury, inter alia, that in evaluating the defense, it would focus primarily on the conduct of the officer or agent, and specifically instructed the jury "when deciding whether the defendant was entrapped, consider what a normally law-abiding person would have done in this situation. *Do not consider the defendant's*

particular intentions or character or whether the defendant had a predisposition to commit the crime." (Italics added.) The court also instructed the jury that it must follow the law and instructions as provided by the court and instructed the jury, before and after the evidentiary phase of trial, with the standard cautionary instruction not to let bias, sympathy, prejudice, or public opinion influence its decision.

Jurors are routinely instructed to limit the purposes for which evidence may be considered, and we presume they are able to understand and follow such instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) Indeed, the presumption that jurors understand and follow instructions is "[t]he crucial assumption underlying our constitutional system of trial by jury." (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) We are presented with no reason to believe that the jurors in this case were unable to follow the instructions here.

In sum, the record does not indicate that, but for trial counsel's failure to object to the challenged evidence pursuant to section 352, the evidence would have been excluded. The potential prejudice from the evidence did not substantially outweigh its probative value, especially in light of the entrapment and standard cautionary jury instructions. Thus, defendant has not established he received ineffective assistance of counsel.

II

During jury selection, defense counsel brought a potential discovery issue to the trial court's attention. Agent Cervelli

had taken notes in a case management notebook during the controlled buy operation. The prosecution had provided defense counsel with a detailed list documenting several cash payments made to Craig during the buy operation but had not provided the case management notebook. The parties disagreed as to whether the notebook was discoverable.

With the parties' agreement, the trial court conducted an in camera review of the notebook, pursuant to Penal Code section 1054.7. Upon completion of the in camera review, the trial court ordered a two-page letter disclosed to defendant but otherwise ruled that the prosecution had complied with disclosure requirements. The trial court ordered the transcript of the in camera review and the undisclosed portions of the case management notebook sealed.

Defendant requests this court independently review the sealed materials for correctness of the trial court's ruling. The People have no objection to this requested procedure.

We have reviewed the records and find no error in the trial court's ruling, as the sealed materials do not contain any material, undiscovered documents. (See *People v. Martinez* (2009) 47 Cal.4th 399, 453-454; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1132-1133, disapproved on another point in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

ROBIE, J.

BUTZ, J.